Supreme Court, U.S.
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No. _____

In The

Supreme Court of The United States

SCOTT AND JANET BRANNAM, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE HUNTINGTON MORTGAGE COMPANY, an Ohio Corporation,

Respondent.

Petition for a Writ of Certiorari
From The United States Court of
Appeals for the Sixth Circuit

ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a mortgage lender's fee for "Document preparation" reasonable in amount within the meaning of Regulation Z (12 C.F.R. 226.4(c)(7)), and thus properly excluded from the finance charge disclosed on a consumer's Truth in Lending Act disclosure, notwithstanding that the fee exceeds the lender's costs and thus increases the lender's yield?

Is a mortgage lender's fee for "Document preparation" bona fide within the meaning of Regulation Z, 12 C.F.R. 226.4(c)(7), and thus properly excluded from the finance charge disclosed on a consumer's Truth in Lending Act disclosure notwithstanding the fact that it told borrowers it was charging its "cost" when it was really making a profit?

What do the words "bona fide and reasonable in amount," as used in Regulation Z, 24 CFR 226.4(c)(7), mean?

PARTIES

Scott and Janet Brannam are homeowners who took a home mortgage loan from Huntington Mortgage Company.

Huntington Mortgage Company is an Ohio mortgage lender that is a wholly owned subsidiary of Huntington Bank, N.A.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The District Court's two opinions were not reported. The Appellate Court opinion was reported at 287 F.3d 601 (Sixth Cir. 2002). All three opinions are reprinted in the Appendix.

BASIS FOR JURISDICTION

This petition seeks review of a judgment of the United States Court of Appeals for the Sixth Circuit entered April 29, 2002. A petition for rehearing *en banc* was denied July 11, 2002. This petition is timely filed within 90 days of that date as provided by Rule 13(3). Jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 15 U.S.C. §1605 provides:

> §1605. Determination of finance charge
>
> (a) "Finance charge" defined. Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.

* * *

(e) **Items exempted from computation of finance charge in extensions of credit secured by an interest in real property**. The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of

the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of loan-related documents.

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees, including fees related to any pest infestation or flood hazard inspections conducted prior to closing.

(6) Credit reports.

Title 12 U.S.C. §226.4 provides:

§226.4 Finance charge.

(a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

* * *

(c) Charges excluded from the finance charge. The following charges are not finance charges:

* * *

(7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:

(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

(iii) Notary and credit report fees.

(iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest infestation or flood hazard determinations.

(v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

STATEMENT OF THE CASE

Respondents, plaintiffs below, claim Huntington Mortgage Company violated the Truth in Lending Act, 15 USC §1601 et. seq., by failing to disclose its $250 "Document preparation" fee as an element of the finance charge. Under Regulation Z, 12 C.F.R. 226.4(c)(7), fees for preparing documents may be excluded from the finance charge only if they are bona fide and reasonable in amount.

Although this case was dismissed by the district court in the infancy of discovery, discovery in an earlier case, filed in this case, established that FMB-Grand Rapids, which subsequently merged into Huntington Bank, had an actual cost of preparing documents of $15.87. After the merger, Huntington prepared documents using the same software and human resources FMB-Grand Rapids had used.

Huntington published a web page which offered to consumers the following:

> **Documentation Fee**
> A fee a lender or seller (depending on the agreement) may have to pay for preparation of legal papers such as the mortgage contract, deed of trust, note or deed. These services may be included under another service fee or the settlement agreement may determine that the borrower must pay these costs. [Emphasis supplied]

* * *

> **Documentation**
> You or the seller (depending on your agreement) may have to pay a fee for preparation of final legal papers such as the mortgage contract, deed of trust, note or deed. Be sure to ask your mortgage lender if these services are included under some other service fee or if the settlement agreement states that you need to pay these costs. [Emphasis supplied]

Document preparation services are available to lenders from third parties for nominal sums.

For example, one provider offers complete document preparation services for $35.00. See http://www.docmagic.com/home/fees.jsp.

The district court dismissed the case, ruling that document preparation fees are bona fide if the lender actually prepares documents, and that they are reasonable in amount if they are roughly equivalent to what other lenders charge for document preparation. The Sixth Circuit affirmed.

ARGUMENT

I. INTRODUCTION

The Sixth Circuit's decision in this case abandons this Court's long-standing and consistent declaration that the Truth in Lending Act ("TILA") rejects market forces as an appropriate means to rein in loan fees, and adoption of a policy in favor of full and complete disclosure of the real cost of credit. See Mourning v Family Publication Services, 411 U.S. 356, 377 (1973). At the heart of this policy, articulated by Congress and embodied in the TILA, is the accurate disclosure of finance charges, those assessed by the creditor as profit derived from the financing transaction. The TILA expressly provides that except for certain narrowly crafted exceptions all charges assessed by the creditor directly or indirectly in

connection with the extension of credit are finance charges.

With its decision the Sixth Circuit authorizes creditors to exclude charges presumptively considered finance charges under Section 1605 by labeling them as fees for one of the activities enumerated under 15 U.S.C. §1605(e) and Regulation Z, regardless of whether or to what extent the charge increases the creditors' yield. This plenary right to exclude a charge is conditioned only upon a showing that other creditors are assessing charges in similar amounts, without regard to the extent those other creditors are increasing their yields by such charges, or disclosing them as finance charges. This circular paradigm for excluding fees from the finance charge not only eviscerates TILA of its principal purpose -- full disclosure of the cost of credit -- but positions

discrete segments of the finance industry to increase yields without disclosure to the consumer, on grounds that everyone else is doing it. In the vacuum created by this new paradigm, the Sixth Circuit has rewritten the Federal Reserve's "bona fide and reasonable" test to provide a safe harbor for creditors to increase yields without consumer disclosure. The Sixth Circuit creates this safe harbor by holding that a creditor is not required to demonstrate the charge bears some relationship to its costs (i.e. it does not increase its yield), only that other creditors charge like fees regardless of whether they too are inflating their yields. Mourning forbids this result.

II. SPECIFIC ALLEGATIONS OF ERROR

Under 15 U.S.C. §1605, all charges levied in connection with consumer credit are finance charges and must be disclosed as such on a Truth in Lending

Disclosure, unless they fit into one of several narrowly crafted exceptions. "Document preparation" fees may be excluded only if they are "bona fide" and "reasonable in amount." The Court erred when it:

(1) endorsed a definition of "reasonable in amount" at odds with Mourning, that permits lenders to reap undisclosed profit, and grounds the question of "reasonableness" upon an industry plebiscite where what is "reasonable" may be determined completely -- and subjectively -- by the lending industry itself;

(2) endorsed a definition of "bona fide" which permits the Bank to charge a fee that is something other than what it tells the borrower;

(3) adopted a methodology for defining "reasonable" and "bona fide" under Regulation Z in a manner other than the method spelled out in the Regulation itself; and

(4) failed to treat Appellant's central contention that the Bank's statements to borrowers about how the fee is set are inconsistent with its position in litigation.

III. THE TRUTH IN LENDING ACT

The Truth in Lending Act was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. §1601(a); see Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363-368 (1973); Beach v. Ocwen Federal Bank, 523 U.S. 410, 412 (1998). The Sixth Circuit has joined each circuit in repeatedly and consistently stating that the TILA is a remedial statute and,

therefore, should be given a broad, liberal construction in favor of the consumer. *See* Pfennig v. Household Credit Services, Inc., 286 F.3d 340, 344 (6th Cir. 2002); Inge v. Rock Financial Corporation, 281 F.3d 613, 621 (6th Cir. 2002); Begala v. Ohio Nat'l Ass'n, 163 F.3d 948, 950 (6th Cir. 1999); Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1040 (6th Cir. 1984); Murphy v. Household Finance Corporation, 560 F.2d 206, 210 (6th Cir. 1977).

"The scheme of TILA is to create a system of private attorney generals to aid its enforcement." Jones, 747 F.2d at 1040. Once a court finds a violation of the TILA, no matter how technical, the court has no discretion as to the imposition of liability. *See* Purtle v. Eldridge Auto Sales, 91 F.3d 797, 801 (6th Cir. 1996) *cert. denied*, 502 U.S. 1252, 117 S.Ct. 2411, 138 L.Ed.2d 177 (1997).

The heart of the Truth in Lending Act, 15 U.S.C. §1601 *et. seq.* is its rejection of the doctrine of *caveat emptor* in the realm of consumer credit:

> The Truth in Lending Act reflects a transition in congressional policy from a philosophy of "Let the buyer beware" to one of "Let the seller disclose."

Mourning v. Family Publications Serv., 411 U.S. 356, 377 (1973).

Under 15 U.S.C. §1605(a), the finance charge is "the sum of all charges payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." Exempted from categorization are only those fees specifically excepted "as otherwise provided in this section." 15 U.S.C. §1605(a). "Loan fees" by lenders are finance charges. 15 U.S.C. §1605(a)(3).

Virtually all the fees **exempted** from the finance charge are those charged by third parties for services such as credit insurance, title insurance, recording, appraisal and such. See generally 15 U.S.C. §1605(b) through (e). The reason for this is manifest in the Congressional Record. As the original bill's chief sponsor, Sen. Paul Douglas, noted, the Act was designed to thwart the strategy of consumer lenders who:

> . . . compound the camouflaging of credit by loading on all sorts of extraneous fees, such as exorbitant fees for credit life insurance, excessive fees for credit investigation, and all sorts of loan processing fees which rightfully should be included in the percentage rate statement so that any percentage rate quoted is completely meaningless and deceptive.

109 Con. Rec. 2027 (1963) (remarks of Sen. Douglas). *See also* H.R. Rep. No. 1040, 90th Cong. 2d. Sess.,

reprinted in 1968 U.S.C.C.A.N. 1962, 1970. See also comments of Senator Sarbanes in connection with the 1995 amendment's tolerance provisions, Congressional Record, September 28, 1995, §14567 ["**This increased tolerance for errors . . . is obviously not intended to give lenders the right to pad fees** . . . A lender cannot arbitrarily raise the charge . . . simply because there is wider tolerance."]

There is an exceptionally small universe of fees which may be imposed by the lender **and** excluded from the finance charge, and these are treated in Regulation Z, 12 C.F.R. §226.4(c)(7), where they are subject to the requirement that they be "bona fide" and "reasonable in amount." The reason for imposing this restriction should be fairly obvious -- it is important that lenders not be permitted to eviscerate the Act by relabeling its own fees ("loan

fees") as a different type of fee, and thus exclude them from the finance charge. See Official Staff Commentary on Regulation Z, comment on 12 U.S.C. §226.4(c)(7).

One of these several fees is the document preparation fee. With regard to that fee, one court has written:

> Charges must be reasonable in amount so as not to allow inflated costs to indirectly augment the creditor's yield.

In Re: Grigsby, 119 B.R. 479, 488 (Bkrtcy. E.D. Pa. 1990) vacated on other grounds, 127 B.R. 759 (E.D. Pa 1991). While Grigsby went on to suggest that "reasonableness" may be determined by the market, it did not suggest that the relevant market is limited to other mortgage lenders, nor did it sponsor a market analysis to the exclusion of determining whether the fee "augmented the creditor's yield."

IV. THE MEANING OF "REASONABLE IN AMOUNT"

A. Permitting the Mortgage Lending Industry to Determine When a Fee is "Reasonable" Transforms TILA into a "Let the Buyer Beware" Statutory Scheme that Belies the Remedial Purpose Expressed by Congress

By allowing mortgage lenders by industry plebiscite to determine what a "reasonable" fee is, the Sixth Circuit's decision abandons the rationale, spirit and letter of the Act. The decision leaves it to the "market" to determine what a reasonable fee is, and trusts market forces to keep it reasonable. This is inconsistent with Senator Douglas' comments on the Congressional Record and the absolute antithesis of this Court's admonition that Truth in Lending **rejects** *caveat emptor* in favor of a new credo: "let the seller disclose." Mourning, *supra* at 377. In the view of the Sixth Circuit's opinion, nothing short of evidence of actual collusion would prevent the mortgage lending

industry from relabeling all of its income-producing fees as "Document preparation" fees and excluding them from the finance charge. If this holding stands, the fees attributable to document preparation would be limited only by the imagination of any segment of creditors.[1]

At bottom, the panel decision endorses logic that is entirely circular: A fee may be charged only if it is reasonable; but if lenders are charging the fee, it must be reasonable. Any fee charged by any plurality of lenders -- at any level -- is by definition reasonable and need not be disclosed. This is not what the framers (as witnessed by Senator Douglas' comments)

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[1] In fact, if proof of collusion is necessary to establish that an industry fee is unreasonable, the Truth in Lending Act become entirely superfluous -- with proof of collusion in fee-setting, plaintiffs could pursue their claims under the Sherman Act.

or this Court (as witnessed by Mourning) had in mind.

The **only** way the word "reasonable" can make any sense at all in the context of the Act and Regulation Z is if it requires some nexus between a fee and the lender's costs.

Indeed, as discussed next, Regulation Z itself prescribes the mechanism for determining the definitions of words, and that mechanism -- eschewed by the panel decision -- points precisely in this direction.

B. The Sixth Circuit's Decision Ignores the Procedures Set Forth in TILA for Defining "Reasonable"

The Sixth Circuit's decision acknowledges in Section II that TILA has "definition provisions," but fails to explicate or follow them.

> Unless defined in this regulation, the words used have the meanings given to them by state law or contract.

12 C.F.R. §226.2(b)(3). As no contract definition exists, the courts must turn to state law -- here Michigan law -- which provides that to construe undefined statutory language, you look to the dictionary. K-Mart v. Department of State, 127 Mich. App. 390 (1983).[2]

Webster's Third Collegiate Dictionary defines "reasonable":

> **reasonable** **1a:** agreeable to reason (a - theory) **b:** not extreme or excessive (- requests) **c:** moderate, fair (a - chance) **d:** INEXPENSIVE.

Nothing in this definition suggests you look to the market, yet the Sixth Circuit's decision imports the

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[2] Federal common law also looks to the dictionary to define undefined statutory language. U.S. v. Jenkins, 554 F.2d 783, 786 (6th Cir. 1977).

market into the very legislative scheme the Supreme Court recognizes as **rejecting** market theory in favor of full disclosure of a lender's profits. Mourning, *supra* at 377.

Rather, the dictionary definition rejects such a subjective approach: in order to be reasonable, a fee must be agreeable to reason, not the market; it must not be excessive; it must be inexpensive. It must bear a reasonable relationship to the lender's **costs** in providing the service.

C. Even if a Market Approach to Reasonableness Is Appropriate, the Analysis Must Include Third Party Service Providers

Should, notwithstanding the above, the Court be persuaded that some kind of market analysis is appropriate to determine what kind of document preparation fee is "reasonable," there remains no

reason to exclude third party document providers from the market analysis. Indeed, because borrowers cannot meaningfully shop among lenders for "document preparation" services unbundled from the mortgage loan itself, these third party service providers are the **only** ones meaningfully affected by market forces.[3]

The panel's endorsement of a market based analysis sterilized of third party providers strips the "reasonableness" test of any objectivity. The subjective assessment of the creditor and those in its industry become dispositive of what is "reasonable." Both logic and the purposes behind TILA expose the

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[3] A borrower does not have the luxury of telling "Lender A" that he or she will accept the loan from it, but use "Lender B" for document preparation services. The fact that these services are bundled is exactly why all lender yield needs to be disclosed – this is the point Senator Douglas makes in his above-quoted comments.

error of such a standard for determining whether a creditor's fee is "reasonable." The fact that fees of a creditor are bundled lies at the core of the rationale for requiring disclosure of the finance charge: it permits the borrower to assess the profits the creditor will take from the entire loan transaction. The borrower loses the benefit of meaningful disclosure if lenders are permitted to disguise hundreds of dollars of profit as a "Document preparation" fee and exclude these dollars from the finance charge disclosure.

V. THE MEANING OF "BONA FIDE"

The Sixth Circuit affirmed the district court's determination that a fee for "document preparation" is "bona fide" so long as documents are prepared.[4]

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[4] The Sixth Circuit's treatment avoids the Brannams' central argument made here just as it was made there.

The Brannams argue that no fee can be "bona fide" unless it is in fact what the lender says it is.

Appellee chose to tell its borrowers, on its web site, that the document preparation fee was measured by **cost.** It did not say that it would charge what the market would bear; it did not say it had separate definitions of the fee for purposes of the Truth in Lending Act. It said it charges its **cost**. When it charges something else, it runs afoul of the applicable dictionary definition of **bona fide**.

Webster's Collegiate Dictionary defines "bona fide:"

> **bona fide**\ [L, lit., in good faith] (1788)
> **1:** made in good faith without fraud or deceit (a bona fide offer to buy a farm)
> **2:** made with earnest intent: SINCERE
> **3 a:** neither specious nor counterfeit: GENUINE syn see AUTHENTIC

Accepting Webster's invitation to "see AUTHENTIC" we find:

> **authentic\ 1:** obs: AUTHORITATIVE 2: worthy of acceptance or belief as **conforming to fact or reality:** TRUSTWORTHY **3 a:** not imaginary, false or imitation.
>
> * * *
>
> syn AUTHENTIC, GENUINE, VERITABLE, BONA FIDE mean being **actually and exactly what is claimed.**

Appellee claimed the fee represented its "cost." It now claims it is something else. Because it is not what was claimed, it is not *bona fide*.

CONCLUSION

The Sixth Circuit's decision abandons its own longstanding pronouncements that the TILA is to be liberally construed in favor of consumers, and in favor of full disclosure, to adopt a stilted "bona fide and reasonable" test that lets lenders augment profits without disclosure. In so doing, it reinstates the rule of "let the buyer beware" and depends upon the very market-based protection that this Court has repeatedly cautioned is replaced by the new doctrine of "let the seller disclose." Mourning, *supra* at 377.

Respectfully submitted,

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Dated: October 14, 2002

United States Court of Appeals,
Sixth Circuit.
Scott **BRANNAM** and Janet **BRANNAM**, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,
v.
HUNTINGTON MORTGAGE COMPANY, an Ohio Corporation, Defendant-Appellee.

No. 00-2225.
Argued March 7, 2002.
Decided and Filed April 29, 2002.
Rehearing and Suggestion for Rehearing En Banc Denied July 11, 2002.

OPINION

KENNEDY, Circuit Judge. Plaintiffs Scott and Janet Brannam brought this purported class action suit against defendant Huntington Mortgage Company, challenging a document preparation fee routinely charged by Huntington, but not disclosed as part of the finance charge. Plaintiffs contend that Huntington's actions violate the Truth In Lending Act ("TILA"), as well as state law. The district court granted summary judgment in favor of Huntington,

and plaintiffs now appeal. For the reasons set forth below, we affirm the judgment of the district court.

I.

This case involves the assessment of a document preparation fee in connection with mortgage loans. Huntington routinely charges a document preparation fee of $250 for mortgage loans, although in rare cases that fee may be waived or reduced. Plaintiffs allege that charging this fee without disclosing it as a finance charge violates TILA, 15 U.S.C. §1605(e). Regulation Z, promulgated under TILA, permits lenders to exclude from finance charge disclosures any fees for the preparation of certain "loan-related documents," so long as such fees are "bona fide and reasonable in amount." 12 C.F.R. §226.4(c)(7). Before the district court, plaintiffs raised two distinct arguments. First, they contended that the TILA exclusion should apply only to documents related to the transfer of title, not to all documents connected with a mortgage loan. This argument was based primarily upon an interpretation of the Real

Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §2601 *et seq.*, and an accompanying regulation, 12 C.F.R. §3500 *et seq.*, known as Regulation X. Second, they argued that Huntington's document preparation fee was not "bona fide and reasonable" because it covers loan origination costs and because document preparation services are available on the Internet for substantially less than $250.

On March 6, 2000, the district court heard oral argument on Huntington's motion for partial summary judgment. The court issued an opinion from the bench. It rejected plaintiffs' argument based on Regulation X, finding no support for plaintiffs' attempt to read the terms of that regulation into Regulation Z or the TILA. The court found "no basis whatsoever for the plaintiffs' argument...that because the fee in this case was charged for things other than title transferring documents, that these fees here do not fall within the exemption or exclusion for the definition of the finance charge fees under [the TILA]." The court concluded that the uniform fees charged by Huntington were bona fide, but reserved

judgment on the question whether they were reasonable, observing that a factual dispute remained as to that question. The court, however, specifically rejected plaintiffs' contention that reasonableness should be determined by comparing the fee charged by Huntington to a fee for document preparation charged by a third-party service available on the Internet. The court declared that the proper measure of reasonableness requires a comparison to fees charged by other lenders in the relevant marketplace. On March 21, 2000, the court entered a written order granting in part and denying in part Huntington's motion for partial summary judgment, holding that "a uniform document services fee is bona fide and properly excludable from the computation of the finance charge in this case, provided such fee is reasonable."

Plaintiffs later moved for relief from this order, arguing that newly discovered evidence would change the court's analysis of the Regulation X issue. The defendant moved for summary judgment on the remaining issue of reasonableness. After hearing

arguments the court denied plaintiffs' motion, reiterating that even if Huntington had violated Regulation X, plaintiffs would not have a private right of action thereunder. The court refused to permit plaintiffs to bootstrap the Regulation X definitions into a TILA violation. The court also granted summary judgment to defendant on the question of whether the fee charged by Huntington was reasonable, based on evidence of the market rate for document preparation fees submitted by Huntington. Having resolved all issues necessary for the disposition of the TILA claim, the court granted summary judgment in favor of defendant on that claim and declined to exercise supplemental jurisdiction over the plaintiffs' remaining state law claims. Plaintiffs appeal.

II.

We review a district court order granting summary judgment under a *de novo* standard of review, without deference to the decision of the lower court. 1 *Taylor v. Michigan Dept. of Corrections,* 69 F.3d 76 (6th Cir.1995);

Lake v. Metropolitan Life Ins. Co., 73 F.3d 1372, 1376 (6th Cir.1995). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c).

TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him...." 15 U.S.C. §1601(a). Under TILA, a lender must disclose the "finance charge" as defined by the statute. The statute exempts from the computation of the finance charge "[f]ees for preparation of loan- related documents." 15 U.S.C. §1605(e)(2). Regulation Z elaborates on this exemption, providing that "[f]ees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents" are excludable "if the fees are bona fide and reasonable in amount." 12 C.F.R. §226.4(c)(7). Plaintiffs advance essentially the same arguments on appeal as they

pursued before the district court, although they characterize them somewhat differently.

First, plaintiffs argue that the fee charged by Huntington is not bona fide because it is not "exactly what it purports to be." Plaintiffs go to great lengths to establish that the court must adopt this dictionary definition of "bona fide," in accordance with TILA's definition provisions. This means, they suggest, that Huntington can charge only its costs of preparing title-related documents, such as notes, mortgages, and deeds. This is so, the argument goes, because Huntington itself claimed that these were what the fee was for by entering the amount of $250 on Line 1105 of the Good Faith Estimate form required by Regulation X. As the district court noted, this is a strained effort by plaintiffs to bootstrap an arguable violation of Regulation X, for which there is no private right of action, into a TILA violation. Regulation X is simply not germane to plaintiffs' TILA claim. *See Inge v. Rock Financial Corp.*, 281 F.3d 613, 626 & n. 4 (6th Cir. Feb. 26, 2002). Moreover, the plaintiffs seemingly ignore the plain language of

Regulation Z, which permits the exclusion of fees for the preparation of not only mortgages and deeds, but also "settlement documents"--a broad term that would seem to encompass any other documents necessary for the closing of a mortgage loan. The appendix to Regulation X, which provides instructions for filling out the Good Faith Estimate form, states that Line 1105 is for the entry of "charges for preparation of deeds, mortgages, notes, etc." The inclusion of the term "etc." in the Regulation X, Line 1105 definition arguably leaves room for fees for the preparation of settlement documents other than title-transferring documents. But even assuming arguendo that the Line 1105 definition is limited to only title-transferring documents, it does not establish a violation of Regulation Z, which contains a different definition. Like the district court, we reject plaintiffs' strained construction of the applicable regulations.

Next, plaintiffs argue that the document preparation fee is not bona fide because Huntington's own regional manager, John Burmeister, admitted that the fee was for loan origination costs. In considering this

argument, it is crucial to separate Huntington Mortgage Company from its predecessor, First Michigan Bank ("FMB"). FMB was actually a holding company for 14 separate state banks, which apparently maintained some level of autonomy in setting applicable fee structures. Huntington acquired FMB and all of its separate state banks in 1997. Burmeister worked for FMB and stayed with Huntington after the acquisition. The testimony offered by plaintiffs in this case was actually taken in a deposition in connection with a separate case, *Krause v. Huntington National Bank f/k/a FMB-First Michigan Bank Grand Rapids.*

Plaintiffs contend that Burmeister admitted that Huntington's document preparation fee was not set according to the actual costs of document preparation, or even according to a market analysis of the fees charged by other lenders. Rather, they contend, Burmeister admitted that the fee was set by FMB by considering, among other things, mortgage loan origination costs (which are not excludable under Regulation Z), and that they have not since

changed. Huntington argues, and the district court agreed, that plaintiffs are misrepresenting Burmeister's testimony, that Burmeister was describing how fees were set at FMB, and that he also testified that Huntington had performed some market analyses in order to set the fees appropriately, rather than by considering loan origination costs.

Having fully reviewed Burmeister's testimony and considering the testimony cited by plaintiffs in its proper context, this court agrees with Huntington and the district court. Burmeister testified that each of the FMB affiliates had different procedures relative to document preparation fees. He testified that at FMB-Zeeland (the affiliate bank in Zeeland, Michigan) the document preparation fee was $225 prior to Huntington's acquisition of FMB. He further testified that after the acquisition Huntington charged a $225 document preparation fee, which was later raised to $250. He testified that he did not recall the reason for the increase. He testified that the ultimate decision as to the fee would have been made at the home office in Columbus, Ohio, but would have been dependent

upon typical and customary practices in the market in which the branch is located. He testified that after the acquisition, Huntington continued to charge a $225 document preparation fee, that a Huntington employee named Carol Cabot had reviewed what could be programmed into the software that Huntington was switching to, and that he did not know whether the $225 amount was specifically considered and agreed upon, because he was not privy to "what went on in Columbus." He also testified that he was aware of a presentation made by FMB Compliance Officer Tom Snyder before the acquisition. In the presentation, Mr. Snyder indicated that the document preparation fee had been reviewed, and it was appropriate. Burmeister did not recall anything else about the presentation, but plaintiffs have produced a memorandum and other writings that were circulated within FMB that suggest that Snyder was improperly considering loan origination costs in determining whether the document preparation fee was appropriate.[1] Beyond

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[1] Mr. Snyder's specific conclusion was that a systemwide

the Snyder report, Burmeister testified that he did not personally create, nor was he aware of, any *specific reports* regarding document preparation fees. Plaintiffs latch onto this testimony to argue that Huntington never conducted any market analyses of document preparation fees, but simply extended the fee charged by FMB, which was based on Snyder's improper calculation. But that is misleading. Burmeister testified as follows:

> Q: Have you ever seen a report on which somebody else collected the information specifically with regard to the document preparation fee charged by other mortgage lenders in the West Michigan area?
>
> A: I would have seen -- I would have had a discussion, a review of what other competitors would have charged within the marketplace that we were in fact competing in.
>
> Q: You used the phrase would have. You don't have any specific recollection of ever looking at such a report, do you?

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maximum document preparation fee of $400 was appropriate and excludable under Regulation Z.

A: Not a report per se.

Q: You don't have any specific recollection of an individual being charged with going out and gathering the information about what other banks charge with regard to fees for the preparation of documents?

A: No. I mean, there would have been discussion, but not -- I'm not sure I understand your question. Why don't you repeat the question for me.

Q: You're not aware of any specific report that anyone has made that compiles information with regard to the document preparation fees charged by other lenders in the West Michigan area?

A: No.

That Burmeister could not remember any specific report when pressed for one is not evidence that Huntington never conducted any such analysis. Indeed, Burmeister testified that after the acquisition Huntington employees in Columbus reviewed the fees that were being charged (although he could not

say that the document preparation fee itself was specifically considered because he did not have such knowledge). Further, his testimony above suggests that discussions about the appropriate document preparation fee were held, but that he simply could not remember any specific reports. Plaintiffs do not have any evidence that connects Huntington to the document preparation fee practices engaged in by FMB. Because plaintiffs' mortgage loan was extended by Huntington, after the acquisition, they have no evidence that the fee covered any loan origination costs. Hence, there is no evidence that the fee was not "bona fide" under Regulation Z.

Finally, plaintiffs contend that the fee charged by Huntington is not "reasonable in amount" as required by Regulation Z. They contend that no meaningful marketplace comparison can be conducted where the fees charged by other lenders are for different costs or services, sometimes even for items that are not excludable under Regulation Z. Essentially, plaintiffs assert that mortgage lenders may only charge as a

document preparation fee the amount of the lender's actual costs for preparing loan related documents. Here, Huntington had its own employees prepare the relevant documents, rather than using a third-party service. Hence, it is difficult to determine the actual document preparation costs of each individual loan.

The scant caselaw on this subject tends to support Huntington's contention that the fee should be considered reasonable if it was for a service actually performed and reasonable in comparison to the prevailing practices of the industry in the relevant market. In *In re Grigsby,* the court stated:

> To be excluded from the finance charge, the fees must not only be the right types, but they must also be "bona fide and reasonable in amount." They are bona fide even if the services for which the fees are imposed are performed by employees of the creditor rather than by a third party.... Charges must be reasonable in amount so as not to allow inflated costs to indirectly augment the creditor's yield. Reasonableness should be determined by comparing the

> charges imposed by a particular creditor with the prevailing practices of the industry in the locality.

119 B.R. 479, 488 (E.D.Pa.Bankr.1990), *vacated on other grounds by* 127 B.R. 759 (E.D.Pa.1991) (quoting R. Rohner, The Law of Truth in Lending, §3.03 [2][a], at 3-30 to 3-31 (1984)).

Because defendant has produced evidence suggesting that $250 is a reasonable fee for document preparation in Western Michigan, and plaintiffs have not produced any evidence to the contrary, we agree with the district court that there is no genuine issue of material fact as to whether the fee was "reasonable" as required by Regulation Z. That document preparation services are offered on the Internet for substantially less does not create an issue of fact as to reasonableness. The relevant inquiry is not whether Huntington has used the cheapest third-party service available to it anywhere, but whether the fee is reasonable given the prevailing practices in the relevant market. If plaintiffs had produced any

evidence that Huntington's rate was unreasonable in that context, or that the market rates were tainted by collusion, then summary judgment would not be appropriate. But plaintiffs offered the district court no such evidence.

III.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SCOTT AND JANET BRANNAM,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

Case No. 1:99CV-804
HON. DAVID W. McKEAGUE

v.

HUNTINGTON MORTGAGE CO.,
an Ohio corporation,

Defendant.
_____/

MEMORANDUM OPINION

Plaintiffs Scott and Janet Brannam filed a six-count amended complaint against defendant Huntington Mortgage Company, asserting a federal question claim under the Truth-in-Lending Act, 15 U.S.C. §§1601 et seq., as well as five state law claims. Jurisdiction is premised upon 28 U.S.C. §1331 and §1367. Plaintiffs' claims arose from a real estate

refinancing transaction between plaintiffs and defendant mortgage company entered into in October 1998. Now before the Court are three matters: (1) plaintiffs' motion for relief from the Court's March 23, 2000, order based on newly discovered evidence (Dkt. 39); (2) defendant's second motion for partial summary judgment (Dkt. 40); and (3) defendant's motion to dismiss plaintiffs' state law claims (Dkt. 3).

I. Motion for Relief from Order

Plaintiffs argue that based on documents received from Huntington Mortgage during discovery, they have grounds under Fed. R. Civ. P. 60 for relief from the Court's March 23, 2000, order granting defendant partial summary judgment. Under Rule 60, plaintiffs must show: "(1) that [they] exercised due diligence in obtaining the information and (2) '[that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment.'" *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (quoting *New Hampshire Ins. Co. v. Martech U.S.A. Inc.*,

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be newly discovered evidence previously unavailable to plaintiffs through the exercise of due diligence.

Yet, even if the GFE forms were considered newly discovered evidence, as already explained by the Court during the March 2000 hearing, Regulation X-the implementing regulation for the federal Real Estate Settlement Procedures Act ("RESPA") - does not provide plaintiffs with a private right of action. Even assuming that disclosing the fee on "Line 1105" on the GFE form, then changing it to a "Line 809" fee on the HUD-1 settlement statement, results in a violation of Regulation X, plaintiffs' still do not have an actionable claim for such a violation.

Other than attempting to bootstrap the GFE "Line 1005" disclosure into a limitation on the type of document preparation services for which defendant could charge at closing, plaintiffs' arguments are virtually identical to those rejected by the Court during the March 2000 hearing. In addition to finding that plaintiffs did not have a private right of action under Regulation X, the Court held that the definition of document preparation found in the federal Truth-

in-Lending Act and its implementing Regulation Z was not limited by a similar definition found in RESPA and Regulation X. The Court noted "that the Congress and the Federal Reserve, implementing their authority in Regulation Z thereunder, knew exactly how to define various charges and provide for what can and cannot be included in the calculation of the finance charge." Hearing T. at 4-5. The Court could find no basis for plaintiffs' contention that "because the fee in this case was charged for things other than title transferring documents, that these fees here do not fall within the exemption or exclusion from the definition of the finance charge fees under section 1606(e)(2)." *Id.* at 5. While the disclosure exclusion for document preparation under the Truth-in-Lending Act and Regulation Z may certainly include documents "directly related to transfer of title," it is not strictly limited to that category of documents.

Nothing in plaintiffs' motion for relief or subsequent reply alters the Court's earlier analysis. Accordingly, the motion for relief is denied.

II. Second Motion for Partial Summary Judgment

The only remaining issue on plaintiff's Truth-in-Lending claim is whether the $250 fee charged by defendant for document preparation services was "reasonable" as measured by the relevant market. The Court earlier found that there existed a genuine issue of material fact on this issue. The parties have now had an opportunity to present their proofs, and defendant moves for summary judgment on this issue.

Under Fed. R. Civ. P. 56, the Court must look beyond the pleadings and evaluate the facts to determine whether there is a genuine issue of material fact that warrants a trial. *See Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact concerns "material" facts only if establishment thereof might affect the outcome of the lawsuit under governing substantive law. *Id.* Plaintiffs must "do more than

simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In support of its motion defendant makes two separate offers of proof: (1) an affidavit of Jennifer Cooper, an employee with First American Title Insurance; and (2) complaints filed by plaintiffs' attorneys in separate cases against other mortgage lenders. In her affidavit, Cooper estimates that she has been involved in "approximately 4000 residential real estate closings as a settlement and/or closing agent, and/or loan officer, on residential mortgage loans" over the past fourteen years. Cooper Affidavit ¶3. She recalls that during the relevant time period, various lenders in western Michigan charged document preparation fees ranging from approximately $100 to $500. *Id.* ¶6. Based on her experience, Cooper concludes that "a charge for document preparation in the amount of $250 would be in about the middle of the range of amounts charged by lenders for document preparation in the western Michigan residential mortgage lending

market in 1998." *Id.* ¶7. Cooper's statements are supported by the complaints of plaintiffs' attorneys submitted by defendants, which show a general range of document preparation fees between $120 to $400. *See* Def. Exh. 6-13.

Plaintiffs offer no proofs to rebut defendant's, with the exception of examples of document preparation software purportedly sold for under $100. *See* Plaintiff's Brief in Support at 5. The Court has already rejected this line of proof, *see* Hearing T. at 5-6, and thus its reintroduction at this stage in the case does not create a genuine issue of material fact.

Plaintiffs also question the competency of defendant's market fee proofs. They argue that a survey of the western Michigan lender market could not result in an "'apples to apples' [comparison] in light of all the differences between fees charged by the various banks." Plaintiff's Reply at 9.

Plaintiffs' argument missed the point. To determine the reasonableness of a fee based on the relevant market, the Court may consider whether the fee falls within the general range of fees charged for

similar, yet not identical, services. The Court understands that the specific services Huntington defined as "document preparation services" may differ somewhat from those defined by Mortgage Lenders A, B, or C. Yet, as long the individual services fall within the general category of "document preparation services" as commonly understood in the relevant market, a general comparison of the defendant's fee against an aggregate range of other lenders' document preparation fees is both relevant and material. Plaintiffs' assertions to the contrary do not create a genuine issue of material fact.

Accordingly, based on a thorough review of the parties' arguments and proposed proofs, the Court finds that defendant's fee of $250 for document preparation services was reasonable based on the relevant market in October 1998. Defendant's motion for partial summary judgment is granted, and plaintiffs' federal Truth-in-Lending claim is dismissed with prejudice.

III. Motion to Dismiss State Law Claims

Defendant earlier moved to dismiss plaintiffs' state law claims. The Court took the matter under advisement. Because plaintiffs' sole federal question claim is dismissed, the Court may decline to exercise supplemental jurisdiction on plaintiffs' remaining claims. 28 U.S.C. §1367(c). Upon review, it appears these claims raise novel issues of the unauthorized practice of law, consumer protection, unjust enrichment, fraud, and misrepresentation. The necessary proofs to support these claims will likely be extensive relative to those produced in connection with the federal claim. Accordingly, the Court declines to exercise supplemental jurisdiction over plaintiffs' state claims, and these shall be dismissed without prejudice.

A judgment order in accordance with this memorandum opinion shall issue forthwith.

Dated: September 26, 2000

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SCOTT AND JANET BRANNAM,
on behalf of themselves
and all others similarly
situated,

Plaintiffs,

vs. No. 1:99-CV-804

THE HUNTINGTON MORTGAGE COMPANY,
an Ohio corporation,

Defendant.

_____/

EXCERPT - RULING OF THE COURT
BEFORE THE HONORABLE DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE
Lansing, Michigan, March 6, 2000, at about 5:30 P.M.

APPEARANCES:

John E. Anding
Drew, Cooper & Anding
125 Ottawa Avenue, N.W., Suite 300
Grand Rapids, MI 49503

On behalf of the Plaintiffs;

George G. Kemsley
Bodman, Longley & Dahling, L.L.P.
34th Floor, 100 Renaissance Center
Detroit, MI 48243

On behalf of the Defendant.

Court Reporter: Sharon E. Fox, CSR-3342
315 West Allegan Avenue
Lansing, MI 48933
(517) 484-8083

Lansing, Michigan
March 6, 2000, at about 5:30 P.M.

EXCERPT

THE COURT: Now before the court is the defendant's motion for summary disposition with respect to the plaintiffs' allegation that the defendant mortgage company has violated the Truth in Lending Act, 15 USC section 1601 et seq, by virtue of charging this plaintiff a $250 fee without including such fee in the calculation of the finance charge. The plaintiffs' allegation here is that, while Regulation Z clearly excludes certain fees from the calculation of a finance charge, that the fee here does not fit within an exclusion under either the statute or the regulation.

The statute exempts from the terms of the finance charge fees for the preparation of, quote, loan-related documents. 15 USC section 1605(e). Section 226.4(c)(7) of Regulation Z further elaborates on the type of charges that are not included in the calculation of the finance charge by requiring that the fees be bona fide and reasonable in amount. Subsection (2) provides examples of such fees and

describes them as, quote, fees for preparing loan-related documents such as deeds, mortgages, and reconveyance or settlement documents, end quote.

The defendant in this case apparently charges borrowers a standard $250 fee for the preparation of loan documents. The defendant admits that this fee exceeds what would be necessary to prepare the deed, the mortgage, a note, or other title-conveying documents.

The plaintiff argues that any document preparation fee is limited to the preparation of title-related documents such as a mortgage, deed, or note. The plaintiffs' argument is based not on either the Truth in Lending Act or Regulation Z so much as it is based upon RESPA, Regulation X. The linchpin of the plaintiffs' argument is that because the HUD-1 form has a Line 1105 that deals with certain document preparation fees and because under plaintiffs' construction of Regulation X such fees are limited to title transfer fees for the reasons set forth in the plaintiffs' response to the defendant's motion, that therefore that definition is imported into Regulation Z

and the Truth in Lending Act and, alternatively, that because the defendant listed such fees in the HUD-1 at issue here under Line 1105, that therefore the defendant is essentially estopped to charge anything other than a fee that would be permissible under Line 1105.

Taking these arguments in their reverse order, the latter argument has essentially been rendered moot here by the belated disclosure or discovery apparently of both parties that the document preparation fee here was not listed in the HUD-1 form under Line 1105 at all but it was in fact listed under Line 809.

Undeterred, the plaintiff still argues that because the defendant violated Regulation X by using Line 809, which is not at all apparent to the court or clear from this record, that therefore the defendant is still limited to charging what they could have charged had they properly listed this disclosure on Line 1105. The court has carefully considered those statutes and regulations and forms and finds simply no support for such creative argument. Assuming for purposes

of this opinion that the defendant violated Regulation X, which is not at all clear from the facts of this case, the plaintiff concedes that there is no private right of action under Regulation X. Accordingly, simply because this defendant may have violated Regulation X by placing a disclosure on the wrong line in no way supports the argument by the plaintiff that that is thus a violation of the Truth in Lending Act and Regulation Z by virtue of not including such fee in the calculation of the finance charge.

With respect to the plaintiffs' first argument that the definitions in Title (sic) X are and should be read into Regulation Z and the Truth in Lending Act, the court notes that the Congress and the Federal Reserve, implementing their authority in Regulation Z thereunder, knew exactly how to define various charges and provide for what can and cannot be included in the calculation of the finance charge. The court finds no basis whatsoever for the plaintiffs' argument here that because the fee in this case was charged for things other than title transferring documents, that these fees here do not fall within the

exemption or exclusion from the definition of the finance charge fees under section 1605(e)(2). Furthermore, the fact that the defendant may have made an error in the line in which these fees were listed in Regulation X in no way establishes that the fees are not bona fide for purposes of section 226.4(c)(7) of Regulation Z.

Accordingly, for the purposes set forth in this opinion from the bench, the court finds that these fees are bona fide and properly excludable from the computation of the finance charge in this case provided that they are reasonable in amount.

With respect to the question of whether they are reasonable in amount, the plaintiff argues that no fee that is in excess of what is charged by Internet providers for software to use to prepare loan documents can be reasonable in amount. The court unequivocally rejects that strained construction of Regulation Z and finds that the only construction of the Truth in Lending Act in Regulation Z that makes any sense in the real world is to allow the lender to charge a uniform fee for these services provided they

are disclosed and provided they are consistent with fees charged in the marketplace.

The court reaches this settled conclusion on the basis of the underlying purpose of Regulation Z and Regulation X which are disclosure statutes that are used in order to permit borrowers to reasonably compare the cost of credit from different sources. There is no question here but that this fee was disclosed and could have been compared by this borrower with the fees for similar services charged by other lenders. Accordingly, the court rejects the plaintiffs' contention here that these fees have to be exactly equal to the actual costs incurred by the lender or cannot exceed the amount of the costs for services of this type available using Internet software programs, recognizing, of course, that the very Internet software programs the plaintiff so heavily relies upon here are being provided in electronic form that were not even in existence on a commercial basis at the time that Regulation Z and the Truth in Lending Act were enacted.

Accordingly, it is this court's conclusion that a lender is entitled to charge a fee, the reasonableness of which is measured by the marketplace. The plaintiff contending that this fee is not reasonable according to the marketplace and there being a general issue of material fact on that point at this stage in the proceedings, the court declines to extend this ruling from the bench any further with respect to the reasonableness of the fee here other than to reject the plaintiffs' actual incurred charge argument.

The court will take the defendant's further arguments with respect to the state counts that are before this court in connection with the court's discretion to exercise supplemental jurisdiction under advisement. In this court's opinion, determining whether these fees were reasonable in a market sense should neither be a time-consuming nor complicated or difficult or expensive proposition.

Accordingly, assuming that this remaining issue can be resolved expeditiously, the court puts the parties on notice that the chances are exceedingly high here that the court will decline to exercise its

supplemental jurisdiction on these issues of state law that in this court's judgment both predominate over what is remaining at issue in this case and which are more properly left to a decision of the state courts. Accordingly, assuming a decision can be reached expeditiously on the reasonableness of these charges on a market basis, the parties are notified that it is highly unlikely that this court will continue to exercise supplemental jurisdiction over these state law claims and should proceed accordingly.

Anything further to come before the court this afternoon, Mr. Anding?

MR. ANDING: Nothing further here, Judge.

THE COURT: Mr. Kemsley?

MR. KEMSLEY: No, Your Honor.

THE COURT: All right. Thank you, both. You've both been very helpful, and I'm exceedingly happy that we actually went through with this oral argument here this afternoon in terms of the discovery by both parties that this is not a Line 1105 case at all but rather is a Line 809 case, for whatever difference ultimately that may have, so I appreciate

your forbearance both in connection with the court starting late and you focusing in on what change that discovery makes, if any, as to the facts of this case and the resolution thereof.

(Proceedings concluded at about 5:40 P.M.)

REPORTER'S CERTIFICATE

I, Sharon E. Fox, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provision of Title 28, United States Code, Section 753, do hereby certify that on the date hereinbefore set forth I reported stenographically the proceedings had in the within-entitled and numbered cause; and I do further certify that the proceedings were transcribed by me with the use of computer-aided transcription under my direction and supervision and that the foregoing is a full, true, and accurate transcript of my original stenotype notes.

/s/ Sharon E. Fox
U.S. District Court Reporter
315 West Allegan Avenue
Lansing, MI 48933

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SCOTT AND JANET BRANNAM,

Plaintiffs,

Case No. 1:99-CV-804

v.

HON.
DAVID W. McKEAGUE

THE HUNTINGTON
MORTGAGE COMPANY,
an Ohio corporation,

Defendant.
_____/

ORDER

On March 6, 2000, the Court heard combined oral argument on two motions made by defendant. On November 8, 1999, defendant moved the Court to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), or alternatively, pursuant to 28 U.S.C. §1367(c). (Docket #3). Following a status conference held on December 20, 1999, defendant moved for partial summary judgment on plaintiff's complaint on January 7, 2000, (Docket #14) presenting the same

grounds offered in its motion to dismiss. Consequently, the Court decided to hear argument on the motions collectively, and issued its ruling from the bench.

Now, for the reasons set forth in the Court's opinion from the bench,

IT IS HEREBY ORDERED that defendant's motion for partial summary judgment on Count I of plaintiff's complaint that alleges defendant's practice of assessing a "document preparation fee" without including such fee in the calculation of the finance charge violates the Truth in Lending Act, 15 U.S.C. §1605(e), and that defendant's fees are not "bona fide and reasonable in amount" as required by 12 C.F.R. §226.4(c)(7) ("Regulation Z"), is hereby **GRANTED IN PART**, inasmuch as the Court finds a uniform document services fee is bona fide and properly excludable from the computation of the finance charge in this case, provided such fee is reasonable.

The Court further concludes the reasonableness of such fee is to be measured by the marketplace rather than the actual cost of such

services. Plaintiff having further contended defendant's fee is not reasonable with reference to the marketplace, and there being a genuine issue of material fact as to the reasonableness of the fee at this stage of the proceedings, defendant's motion is **DENIED** as to the reasonableness of the document services fee charged by defendant.

IT IS FURTHER ORDERED that defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is **DENIED AS MOOT**, the Court having decided the issues raised therein in defendant's motion for summary judgment.

Defendant's motion to dismiss because of the predominance of state law claims pursuant to 28 U.S.C. §1367 is **TAKEN UNDER ADVISEMENT.**

Dated: March 21, 2000

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

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